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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5920

MICHAEL V. COSTELLO, and
ROBERTO K. CELESTINEO, and
others similarly situated,

Petitioners,

vs.

LOUIE L. WAINWRIGHT, Director
of the Division of Corrections,
State of Florida, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATUTES INVOLVED

Two of the Florida Statutes provided in the Petition for Writ of Certiorari were amended in 1974. The amendments are not substantial and do not affect this case. The amended statutes are provided below:

Section 944.291 Prisoner released by reason of gain-time allowances.-

(1) A prisoner who has served his term or terms, less allowable statutory gain-time deductions and extra good-time allowances, as provided by law, shall, upon release, be under the supervision and control of the [Department of Offender Rehabilitation] as if on parole, but in no event shall such supervision extend beyond the maximum term or terms for which he was actually sentenced.

(2) The provisions of this section shall not apply to prisoners who, at the time of sentence, could not have earned at least 180 days' gain-time.

Section 945.09 Commitment of prisoners; classification; reception and classification program; transfer.-

(1) All prisoners sentenced to the state penitentiary shall be committed by the court to the custody of the [Department of Offender Rehabilitation].

(2) All prisoners committed to the custody of the [department] shall be conveyed to such institution, facility, or program in the correctional system as the [department] shall direct, in accordance with the [department's] classification scheme. The [department] shall establish a program of graduated punishment [with the following classification of inmates]:

(a) Class I.- Incorrigible inmates for whom a total lockup will be required; facilities shall include, but not limited to, a portion of the Florida State Prison;

(b) Class II.- An intermediate class between Class I and Class II for those inmates who have had difficulty in the system but who have not yet proven themselves to be incorrigible;

(c) Class III.- Inmates for whom there exists hope of rehabilitation.

(3) Each prisoner shall be processed through a reception and evaluation program in the area where the prisoner was committed or where he was incarcerated.

(4) Pursuant to such regulations as the [department] may provide, the [department] is authorized to transfer prisoners from one institution to another institution in the correctional system and to classify and re-classify prisoners as circumstances may require.

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit's decision in this case will arguably affect only a handful of similar cases: cases involving major system-wide challenges to a state's prison system. Suits involving local jails will not require three judges because those cases do not involve statewide injunctions. The vast majority of pro se prisoner complaints will not require three judges because those cases are individual in nature and do not seek statewide relief.

2. The Fifth Circuit's decision is squarely in accord with this Court's decisions. Petitioners in this case sought and obtained an injunction against Defendants requiring Defendants to release thousands of sentenced prisoners contrary to the unequivocal mandate of Florida statutes requiring that such inmates be incarcerated in the custody of Defendants. The basis for the injunction was that continued obedience to those statutes (mandating that Defendants take custody of sentenced prisoners and maintain that custody until expiration of sentence) caused Petitioners to be subjected to cruel and unusual punishment due to the relationship between prison population, prison capacities, and medical care. This Court has frequently ruled that a three-judge court is needed to hear a request to enjoin the execution of a state statute because unconstitutional as applied.

3. The repeal of 28 U.S.C. §2281 on August 12, 1976, does not apply to the case at bar which was filed long before August 12, 1976.

STATEMENT OF THE CASE

Several matters require clarification. First, the preliminary injunction entered in this case against Defendants was written in absolute terms without any limiting reference to the legal power of Defendants. Costello v. Wainwright, 539 F.2d 547, 550 and n.12 (5th Cir. en banc 1976). The preliminary injunction provided:

> That, within one year of the date of this order and preliminary injunction, the defendants are hereby required to reduce the overall inmate population of the Florida Division of Corrections (or its successor agency, if any) to "emergency capacity" (as that term is defined by the 1972 Technical Assistance Report prepared for the Florida Division of Corrections by the American Justice Institute entitled "Overcrowding in the Florida Prison System") in the following stages:
> (a) Within 90 days of the date of this order and preliminary injunction, the inmate population of the Florida Division of Corrections shall be reduced to 2,000 inmates above "emergency capacity".
> (b) Within 150 days of the date of this order and preliminary injunction, the inmate population shall be reduced to 1,500 inmates above "emergency capacity".
> (c) Within 210 days of the date of this order and preliminary injunction, the inmate population shall be reduced to 1,000 inmates above "emergency capacity".
> (d) Within 270 days of the date of this order and preliminary injunction, the inmate population shall be reduced to 500 inmates above "emergency capacity".
> (e) Within 365 days of the date of this order and preliminary injunction, the inmate population shall be reduced to "emergency capacity".
>
> * * * * * * * *
>
> ORDERED AND ADJUDGED:
> That by December 1, 1976, the defendants shall reduce the overall inmate population of the Florida Division of Corrections to "normal capacity", that is, that population which the institutions of the Florida Division of Corrections can properly accommodate on an average daily basis. (E.S.)

The Fifth Circuit, sitting en banc, ruled that the preliminary injunction could only be issued by a three-judge court. The Fifth Circuit reasoned:

> By accepting lawfully committed prisoners, Wainwright would only be subjecting them

> to an environment of constitutional deprivation. To refuse to accept further prisoners would contravene statutory law. Under these circumstances the district court Order condemns the operation of Wainwright's statutory responsibility. 539 F.2d at 551-552.

The Fifth Circuit concluded:

> If a court order is to be entered which requires action of these defendants which will violate Florida laws on the ground that compliance with the law would be unconstitutional, then a three-judge court should be convened. 539 F.2d at 549.

Upon remand the Fifth Circuit expressly stated that the case would not have to start all over again. "The record amassed in the single-judge proceeding could of course be used in any three-judge consideration of this case." 539 F.2d at 549 n.8. The Fifth Circuit's mandate provided:

> The case is remanded to permit the district court to grant only such relief against these defendants as they can provide without nullification of state statutes, and to request the convention of a three-judge court if that is deemed appropriate under the circumstances. 539 F.2d at 552.

The trial court personally visited one Florida institution, the inmate reception center at Lake Butler, Florida. When the trial court appended to its order a photograph of one cell at the reception center, however, the court intended only to indicate that that cell was typical of the 68 such cells at the reception center. The court found that such cells housed transient inmates, who were being classified and then transferred to other institutions. The cells did not house permanent inmates. The court did not find such cells to be typical of cells throughout the Florida prison system. Florida now has 18 correctional institutions (the reception center at Lake Butler is one), 24 community correctional centers, 11 road

prisons, 7 local adjustment centers for women, 10 mental health and drug facilities, and 3 vocational centers.

Petitioners recite passages from a pretrial stipulation entered into between the parties, but do not clearly point out that Defendants did not concede the constitutional issues by stipulation. The stipulation was primarily concerned with a health care study (the Babcock report) and was intended to move the case to a full trial. Defendant Wainwright acknowledges that, in the best of all possible worlds and with a comfortable budget, he would like to implement many portions of the Babcock report, but he has not conceded, stipulated, or in any way agreed that the Babcock report establishes minimum or constitutional standards of health care. The stipulation reads:

> The parties further recognize that the Babcock Commission Report as modified by the Response of the Division of Corrections describes necessary improvements to the delivery of medical services within the prison system which, if implemented, would either:
>
> (A) Create guidelines for adequate medical care (Defendants' position), or
>
> (B) Be a major factor in minimal constitutional standards (Plaintiffs' position). (E.S.)

The positions of the parties are separately stated because the constitutional issues were to be litigated, not stipulated.

ARGUMENT

Reasons for Denying Review by Certiorari

Petitioners have offered this Court three illogical and unsound arguments for the Court to review the en banc decision of the Fifth Circuit in this case.

At bottom, and in apparent recognition that their arguments are not strong, Petitioners make an equitable claim that the courts in this case have failed to deal with "plain violations of fundamental rights." Defendants believe the trial court's preliminary findings on May 22, 1975, were precipitous and not based upon a thorough survey of all Florida's correctional institutions in 1975, but rather were based upon data compiled in 1973. (These preliminary findings were, however, affirmed by the Fifth Circuit "to the extent they would support the granting of appropriate single-judge relief.")

Defendants fully intend to present more evidence upon return to the trial court with respect to the preliminary findings. In particular, circumstances have changed substantially since May, 1975. Defendants have not been idle in the months that it has taken to secure the right to try the constitutional issues in this case before three judges. A comprehensive space utilization survey has been conducted to inventory all of the space of the corrections facilities in Florida and to establish standards for design and maximum capacities correlated with augmented staffing for each institution. This is the first time such data has been available in this case. Also, two legislatures have met since the May 22, 1975, Order was entered. Although the inmate population increased by 4,404 inmates since the last population figure submitted to the trial court (on June 13, 1975), the

1975 Legislature appropriated $23,000,000 for new construction and renovation of prison facilities. $53,000,000 was appropriated in 1976. These construction programs are moving rapidly forward. Moreover, several health care surveys have recently been completed to provide far more up-to-date information than the survey heretofore relied upon by the trial court (the Babcock Report, filed December 19, 1973). The Florida corrections system currently has authorized positions for 26 medical doctors, 15 psychiatrists, and 39 psychologists, and relies as well on outside medical care on a contract basis. Of the authorized positions, only two psychiatrist positions and three psychologist positions are currently vacant. (Compare Estelle v. Gamble, 45 U.S. Law Week 4023, 4027 n.2, November 30, 1976, Stevens, J., dissenting. [Texas described as having 1 to 3 doctors to care for 17,000 inmates with occasional part-time help.])

These, of course, are evidentiary matters to be presented to the trial court. Petitioners advocate that Florida still has not done enough. But this Court should not be left with the impression that granting review of this decision will enable the parties to return to the trial court more quickly or will more speedly determine whether Florida's correctional system in 1977 is "deliberately indifferent" to the serious medical needs of Petitioners. Estelle v. Gamble, supra, 45 U.S. Law Week at 4025.

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I.

THE EN BANC FIFTH CIRCUIT DECISION IN THIS CASE WILL ARGUABLY AFFECT ONLY A HANDFUL OF PENDING CASES: THOSE MAJOR CASES WHICH INVOLVE STATEWIDE CHALLENGES TO THE ADMINISTRATION OF A STATE'S CORRECTIONAL SYSTEM.

Petitioners have strained mightily to make this case into what it is not. By a cursory analysis of statistics, Petitioners imply that the en banc decision of the Fifth Circuit will flood this Court with direct appeals from pro se prisoner civil rights cases. Such doomsday predictions are unfounded and completely illogical.[1]

Petitioners would have this Court believe that the sweeping remedies sought in the case at bar are typical of the normal pro se prisoner lawsuit. This case seeks nothing less than a complete federal court audit (and subsequent administration) of major aspects of Florida's correctional system, including release of prisoners, housing of inmates, staffing, and delivery of medical care. Reallocation of appropriations and sale of state lands no doubt also will be demanded.[2]

Only a handful of states have a case like Costello, and one can be sure that in those few states there is only one such major prison case. The case at bar is to be distinguished from similar cases brought at the local level with regard to county or city jails. Local jail cases are matters of purely local concern, do not involve statutes of statewide effect, and

[1] Though the number of three-judge cases is of course of serious concern to this Court, the number should not be exaggerated. Swift & Co. v. Wickham, 382 U.S. 111, 128 and n.26, 15 L.Ed.2d 194, 206 and n.26, 86 S.Ct. 258 (1965).

[2] See pp. 33-34, supra.

thus do not require three judges.[3] Cf. Wolff v. McDonnell, 418 U.S. 539, 542 n.1, 41 L.Ed.2d 935, 943 n.1, 94 S.Ct. 2963 (1974); Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643, 87 S.Ct. 1544 (1967).

To make their doomsday predictions, Petitioners have taken some substantial liberties with the caseload statistics compiled in the 1976 Annual Report of the Director, Administrative Office of the United States Courts. For example, Petitioners claim that there are 577 class action prisoner civil rights suits pending in the district courts of the nation, and 315 such cases pending within the Fifth Circuit district courts. Those figures, however, represent only cases in which a class action has been alleged.[4] The figures do not represent the number of active class actions which have actually been certified as such by the trial court.[5]

Inmate civil rights suits are characteristically very personal in nature and do not seek statewide changes. Typically an inmate pro se complaint is concerned solely with his discipline, classification, inter-prison transfer, mail, medical appointments and treatment, or personal property. Such individual suits are not by any stretch of the imagination a proper subject for a three-judge court. The Florida Attorney General's Office presently has 412 pending prisoner civil rights

[3] See, e.g., Inmates, D.C. Jail v. Jackson, 416 F.Supp. 119 (D. D.C. 1976); Miller v. Carson, 401 F.Supp. 835 (M.D. Florida, 1975); Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Detainees of Brooklyn H. of Det. for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975); Taylor v. Sterrett, 344 F.Supp. 411 (N.D. Tex. 1972); Hamilton v. Love, 328 F.Supp. 1182 (E.D. Mo. 1973); Hamilton v. Schiro, 338 F.Supp. 1016 (E.D. La. 1970); Inmates of Suffolk County Jail v. Eisenstadt, 360 F.Supp. 676 (D. Mass. 1973); Jones v. Wittenberg, 323 F.Supp. 93 (N.D. Ohio 1971); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281 (6th Cir. 1974).

[4] 1976 Annual Report of the Director, Table 38, pp. 119-120.

[5] Moreover, Petitioners do not explain how one can predict three-judge court status from a bare allegation of class action.

cases. Only one of these, the case at bar, is a three-judge court case; no demand for a three-judge court is intended or appropriate in any of the other cases.

The overwhelming majority of prisoner civil rights cases are uncomplicated and are terminated by the court before pretrial conference. Of 5,793 prisoner civil rights cases terminated in FY 1976 by court action, 5,277 prisoner cases were ended before pretrial conference.[6] Only 258 prisoner civil rights cases were terminated by trial in FY 1976, or 4.4% of the cases terminated.[7]

Thus, of the 6,341 prisoner cases cited by Petitioners which were pending on June 30, 1976,[8] very few seek the kind of sweeping relief that is sought herein. Nearly all of those 6,341 cases will remain individualized cases, local in character, and will not require three-judges.

Petitioners assert that the Fifth Circuit in this case has unreasonably expanded the three-judge court statute, and claim that the case at bar is part of a trend in the Fifth Circuit that originated with the Fifth Circuit's en banc 1973 three-judge prison decision, Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973), cert. den. sub. nom., Guajardo v. Estelle, 416 U.S. 992 (1974). If Petitioners' catastrophic predictions were correct, the statistics since 1973 should show a significant increase in three-judge courts hearing prisoner cases. Nationwide, however, there were only 3 three-judge courts convened in FY 1974 to hear prisoner petitions.[9] In FY 1975, there were 9 such courts; and in FY 1976, there were

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[6] 1976 Annual Report of the Director, Table C4, p. I-25.

[7] Ibid.

[8] Ibid, at Table C3A, pp. I-20 and I-21

[9] Ibid, at Table 37, p. 116.

(5)

only 7 three-judge courts to hear prisoner petitions.[10] Moreover, there has been a decrease in FY 1976 in three-judge courts convened to hear general civil rights suits. In FY 1974 there were 171 such courts, 192 were convened in FY 1975, and 161 were convened in FY 1976.[11]

If it were true that the Fifth Circuit has been cavalier in its construction of the three-judge court statute, the statistics would show that trend also. But in FY 1976, the Fifth Circuit heard 133 appeals in prisoner civil rights cases (out of the 619 heard nationally)[12] and in only two[13] to our knowledge, did the Fifth Circuit rule that a three-judge court was required.

The case at bar therefore is not a typical prisoner civil rights case. One reasonably can expect that the three-judge court decision in this case will only have application to a handful of similar major statewide attacks upon other state prison systems. Gates v. Collier, 407 F.Supp. 1117 (N.D. Miss. 1975) is an example.[14] Gates v. Collier, is a massive attack upon Mississippi's prison system.

Furthermore, assuming arguendo that the decision in this case will apply to a few major prison suits, it does not

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[10] Ibid. The Annual Report of the Director does not report the number of prisoner petition three-judge courts in the Fifth Circuit in FY 1976.

[11] Ibid.

[12] Id., at Table B7, p. I-10. The Fourth Circuit led the nation in appeals from prisoner civil rights cases, hearing 185 appeals.

[13] Costello v. Wainwright, 539 F.2d 547 (5th Cir. 1976); Morales v. Turman, 535 F.2d 864 (5th Cir. 1976).

[14] It is still not at all certain that Gates will require three judges. As of January 17, 19777, the attorney of record for Mississippi advises us that no three-judge court has yet been convened, although Judge Keady made his request on November 19, 1976. Mississippi intends to move to dissolve any three-judge court because Mississippi's prison population has declined since November 19, 1976.

inevitably follow that all portions of those cases must be reviewed by this Court on direct appeal pursuant to 28 U.S.C. §1253. This Court's direct appellate jurisdiction is narrowly confined to three-judge court orders granting injunctive relief or denying such relief after a resolution of the constitutional claim. MTM, Inc. v. Baxley, 420 U.S. 799, 43 L.Ed.2d 636, 95 S.Ct. 1278 (1975). Furthermore, not all aspects of such litigation need to be litigated before three judges. For example, the damages portion of a suit may be remanded to a single judge for decision. See, e.g., Lavine v. Milne, ____U.S.____, 47 L.Ed.2d 249, 254 n.5 (1976). Indeed, that is precisely what has occurred in the case at bar. The Fifth Circuit remanded this case to the trial court to determine what single-judge relief would be appropriate and to request convention of a three-judge court for three-judge relief. Costello v. Wainwright, 539 F.2d 547, 552 (5th Cir. 1976). Issues in three-judge cases which are properly triable only before a single judge are appealable only to the Circuit Court of Appeals. Perez v. Ledesma, 401 U.S. 83, 27 L.Ed.2d 701, 91 S.Ct. 674 (1971).[15]

In summary, the Fifth Circuit's decision in this case will arguably affect only a few major prison suits. With the repeal of 28 U.S.C. §2281, the decision has no impact on future cases. The decision is not, therefore, sufficiently important to warrant review by certiorari.

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[15] Admittedly, however, this Court has accepted direct appellate jurisdiction of single-judge issues if such issues are factually related to the three-judge claim and decided by three judges. See, e.g., Allee v. Medrano, 416 U.S. 802, 40 L.Ed.2d 566, 94 S.Ct. 2191 (1976); Philbrook v. Glodgett, 421 U.S. 707, 44 L.Ed.2d 525, 95 S.Ct. 1893 (1975). But it is also true that this Court has historically interpreted 28 U.S.C. §1253 as evidencing a Congressional policy of minimizing this Court's mandatory docket, MTM, Inc. v. Baxley, supra, 420 U.S. at 803, and it would be entirely consistent with that tradition for the Court to construe 28 U.S.C. §1253 as limited to appeals from orders granting injunctive relief based upon resolution of issues which were triable only before three judges.

II.

THE FIFTH CIRCUIT'S DECISION IN THIS CASE IS SQUARELY IN ACCORD WITH DECISIONS OF THIS COURT.

Petitioners argue that the preliminary injunction in this case did not involve a challenge to any state statute, but merely addressed "the conditions" in the state prison system. What Petitioners are doing is confusing the remedy demanded (release of prisoners) with the basis for such remedy.

The trial court ruled that imprisonment in the custody of Defendant Wainwright constitutes cruel and unusual punishment because of the interrelationship found between prison space, prison population, and delivery of medical care. Imprisonment is mandated by the legislature of Florida through several statutes of statewide application. (These statutes make the Costello case distinguishable from Morales v. Turman, 535 F.2d 864 (5th Cir. 1976), petition for certiorari filed as No. 76-5881, December 16, 1976.) The relief sought by Petitioners herein was an injunction against the execution of those statutes because (it was alleged) imprisonment pursuant to those statutes deprives Petitioners of their right not to be subjected to cruel and unusual punishment ("overcrowding").[16]

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[16] "By accepting lawfully committed prisoners, Wainwright would only be subjecting them to an environment of constitutional deprivation. To refuse to accept further prisoners would contravene statutory law. Under these circumstances the district court Order condemns the operation of Wainwright's statutory responsibility." Costello v. Wainwright, 539 F.2d 547, 551-52 (5th Cir. 1976).

A.

The Intent and Effect of the Preliminary Injunction

The May 22, 1975, preliminary injunction in this case has the inescapable effect[17] of requiring Defendant Wainwright either to refuse to accept custody of newly convicted and sentenced prisoners or prematurely release thousands of sentenced felons. Release of prisoners is exactly the relief requested by Plaintiffs and exactly what the trial court intended to accomplish. The record directly contradicts Petitioners' assertion that the preliminary injunction "may not" require the release of prisoners or was not intended by the court to have that effect.

Release of prisoners (or closing the prisons to new prisoners, which is the same thing) is precisely what the Plaintiffs demanded. Plaintiffs filed three motions for a preliminary injunction to restrain Defendants from accepting new inmates.[18] The Second Amended Complaint now before the trial court asks the court to reduce prison population.[19] The motion filed on April 21, 1975 (which was the catalyst for the preliminary injunction) was entitled: "Renewal of Application for Injunction to Close Prisons to Additional Entrants"[20] That motion asked " . . . that this Honorable Court will consider this matter and will enter its order immediately closing Florida's prisons to new entrants and

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17 Resolution of the narrow issue of whether the preliminary does in fact order Defendant to release prisoners is hardly important enough for this Court to grant the writ of certiorari. The important issue is whether the en banc Fifth Circuit decision is consistent with three-judge court opinions of this Court; to resolve this issue it should be assumed that the preliminary injunction does in fact require the release of prisoners.

18 These motions were filed February 8, 1973, March 1, 1973, and April 21, 1975. Costello v. Wainwright, 397 F.Supp. 20, 22 (M.D. Fla. 1975).

19 Costello v. Wainwright, 397 F.Supp. at 21.

20 Ibid.

requiring that, within a reasonable time, the current population be reduced to acceptable levels as shall be determined by the Court."[21] (E.S.)

Plaintiffs got exactly the remedy that they requested. The trial court made it very plain in the first two sentences of its preliminary injunction that the preliminary injunction was intended to grant the same relief which had been requested by Plaintiffs:

> This cause came before the Court with respect to the plaintiffs' renewal of application for injunction to close prisons to additional entrants, filed herein April 21, 1975. The plaintiffs seek to have this Court close Florida's prison system to additional entrants and, in addition, require that the current inmate population be reduced to acceptable levels consistent with constitutional standards. For the reasons set forth below, the Court will require the defendants to lower the inmate population of the Division of Corrections to so-called "emergency capacity" within one year of the date of this order and preliminary injunction and to normal capacity by December 1, 1976. (E.S.) Costello v. Wainwright, 397 F.Supp. 20, 21 (M.D. Fla. 1975).

It is true that the trial court somewhat equivocally disclaimed that it was ordering Appellant Wainwright to refuse to accept prisoners lawfully committed to his custody, but also cryptically added in the same breath that Defendant " . . . may use whatever means within his control, consistent with his constitutional and statutory obligations, to comply with this Court's injunction." (E.S.) Costello v. Wainwright, 397 F.Supp. 20, 36 (M.D. Fla. 1975). If the trial court is correct that incarceration in Florida prisons is cruel and unusual punishment, then to remain "consistent with his constitutional obligations" Defendant

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21 As recently as December 10, 1976, Plaintiffs again moved in the trial court for a preliminary injunction to reinstate the time-table reduction in prison population contained in the May 22, 1975, preliminary injunction.

Wainwright must not accept (or must release) prisoners. The trial court's disclaimer thus is not something upon which the Defendant may safely rely.[22]

But there is more evidence in the record as to the intent and effect of the preliminary injunction. On June 10, 1975, the Fifth Circuit remanded this case to the trial court for hearings to determine if in fact Defendants could comply with the preliminary injunction. Defendants had only two options: expand prison capacity or release prisoners. After two days of hearings the trial court found as a matter of fact that it is completely beyond the lawful power of Defendants to expand prison capacity to comply with any stage of the preliminary injunction.[23] The trial court found: "The Florida prison system will not have the emergency capacity to house the number of inmates, 15,112, it anticipates will be confined in the first stage of the court's order (August 20, 1975) at any time during the operative portion of the order."[24] The trial court also stated" "While relief of overcrowding cannot be accomplished by the construction of new facilities, either by traditional methods requiring three to five years or the untried modular method requiring eight to twelve months, the

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22 "The argument that discretionary discharges and facility control within the Director's legal power are sufficient to permit compliance with the Order without Florida law violation must fail because the district court's Order is written in absolute terms without limiting reference to the legal power of these defendants." (E.S., footnote omitted.) Costello v. Wainwright, 539 F.2d 547, 550 (5th Cir. 1976).

23 A great amount of testimony is in the record describing the Defendants' efforts to enlarge the capacities of Florida's many correctional institutions, and indeed the trial court stated that Mr. Wainwright was to be highly commended for his use of innovative techniques. 397 F.Supp. at 34-35. Defendant Wainwright of course cannot build new prisons unless the legislature enacts legislation to tax the people, raise the revenues, and appropriate those revenues to the construction of new prisons.

24 (E.S.) Unpublished Findings of Fact and Conclusions of Law, June 27, 1975, p. 5 (Petitioners' Appendix, p. 33A).

Defendants' obligation to eliminate existing unconstitutionalities is not obviated by that fact."[25]

Since Defendant Wainwright cannot further expand prison capacity, he can comply with the preliminary injunction only[26] by refusing to accept duly sentenced felons or by premature release of inmates now in his custody.

B.

The Preliminary Injunction "Restrains the operation and execution" of major State statutes because allegedly unconstitutional as currently applied.

It should not be surprising that it requires a court of three judges pursuant to 28 U.S.C. §2281, to order state officials to release thousands of sentenced prisoners in direct violation of statutes of statewide application that mandate a system of incarceration. The en banc decision of the Fifth Circuit in this case is correct not because eleven circuit judges reached the same conclusion, but because the decision is squarely consistent with opinions of this Court, taking

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25 (E.S.) Ibid, p. 12 (Petitioners' Appendix, p. 33A).

26 Petitioners suggest that the Defendant has statutory discretion to release prisoners by "liberalizing" Florida Statute 944.29, which allows the award of extra good time allowances to deserving inmates. Petition for Writ of Certiorary, p. 22, n. 18. But to "liberalize"the statute would require violation of the statute. Section 944.29 provides:

> Extra good time allowances.- The division may allow, in addition to time credits, an extra good time allowance for meritorious conduct or exceptional industry. (E.S.)

Mr. Wainwright can only grant extra good time allowances if the inmate is deserving, that is, if there has been "meritorious conduct or expectional industry." Godd time can only be awarded in accordance with the express terms of the authorizing statute. Cf. Alexander v. Wilson, 540 P.2d 331, 334 (Colo. 1975). The trial court's reference to similar statutory remedies are similarly useless to the Defendant either because the authority therein is vested in another state official or because the authority therein is limited by statute.

into full consideration the narrow construction historically given to 28 U.S.C. §2281.

On numerous occasions this Court has explained the purpose of a three-judge court. The most important feature is that a three-judge court provides the benefit of the collective judgment of three judges in major litigation, thereby safeguarding the delicate and sensitive balance between state and federal authority:

> . . . these sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154, 9 L.Ed.2d 644, 653, 83 S.Ct. 554 (1963).

> The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. Phillips v. United States, 312 U.S. 246, 85 L.Ed. 800, 804-5, 61 S.Ct. 480 (1941).

The Florida statutes involved in this case embody major legislative policies of statewide application. As mentioned above, Florida has 18 major correctional institutions and numerous smaller institutions located throughout the State. On January 17, 1977, there were 18,181 sentenced prisoners in the custody of Defendant Wainwright.

Because it is so obviously true one tends to forget that a state can deprive a person of his liberty and place him in prison only pursuant to the unequivocal mandate of a system of statutes. Defendant Wainwright receives sentenced prisoners and maintains custody until the sentence is served not as a matter of discretion, but because he is absolutely required to do so by legislative policy embodied in Florida statutes.

Mr. Wainwright is obligated by Florida Statutes, Sections 945.09(1) and 944.16, to receive and maintain custody of all persons sentenced to the Florida correctional system.[27] If Defendant Wainwright obeys the preliminary injunction and refuses to accept custody of newly sentenced felons he will violate a Florida criminal statute. Section 839.21, Florida Statutes, provides:

> 839.21 Refusal to receive prisoner.- Any jailer or other officer, who willfully refuses to receive into the jail or into his custody a prisoner lawfully directed to be committed thereto on a criminal charge or conviction, or any lawful process whatever, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Section 839.21, Florida Statutes, is strictly enforced by the Governor.[28]

Plaintiffs acknowledged the existence of the mandate of these statutes in their First Amended Complaint filed on December 14, 1972. Paragraph 5 unabashedly stated:

> Defendants, LOUIE L. WAINWRIGHT, L. E. DUGGER, and J. F. TOMPKINS, are the officials charged under the laws of the State of Florida with the custody, maintenance, and care of the Plaintiffs. (E.S.)

Plaintiffs have since studiously avoided any further citation to these state laws, but the remedy demanded - closing the prisons to additional prisoners or release prisoners - can only be accomplished if the statutes that mandate otherwise are enjoined. In a matter as serious as release of sentenced

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[27] These statutes are reproduced in the Petition for Writ of Certiorari.

[28] The trial court wrote: "However, now that the evidence is clear that the Governor of the State of Florida has issued strict orders to the defendant Wainwright that he not refuse to accept further inmates, this Court cannot decline to act." Costello v. Wainwright, 397 F.Supp. 20, 34 (M.D. Fla. 1975).

prisoners, the test is the concrete effect of the trial court's order, not the pleader's artful choice of words.[29]

The test applied by this Court to determine whether a statute has indeed been enjoined in its operation is pragmatic and results-oriented, and does not turn upon whether the Plaintiffs (or the trial court) have specifically mentioned the statute. This Court has thus been primarily concerned whether there is an "interdiction of the operation at large of the statute," Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155, 9 L.Ed.2d 644, 653, 83 S.Ct. 554 (1971), whether there has been "interference by interlocutory injunction with the enforcement of State legislation," Stratton v. St. Louis Southwestern R.Co., 282 U.S. 12, 14, 75 L.Ed. 135, 137 (1930), whether "by the action of one judge the machinery of state laws can be arrested," Florida Lime and Avocado Growers v. Jacobsen, 362 U.S. 73, 4 L.Ed.2d 568, 572, fn. 5, 80 S.Ct. 568 (1960), or whether there has been "an improvident statewide doom by a federal court of a state's legislative policy," Phillips v. United States, 312 U.S. 246, 251, 85 L.Ed. 800, 803, 61 S.Ct. 480 (1941).[30]

The reason for the preliminary injunction, as stated by the trial court, was that incarceration in Florida's correctional institutions (obedience to statutes mandating incarceration) subjected Plaintiffs to cruel and unusual

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[29] "It is one thing to permit the party for whose benefit an appeal is provided to lose the privilege by artless pleading; it is quite another to permit one party, by artful pleading, to avoid a procedural requirement desined for the protection of the other. The three-judge requirement was enacted to protect the States, not plaintiffs; if in substance the case is within the requirement, the statute should not be frustrated by a form of words." (E.S.) Currie, The Three-Judge District Court in Constitutional Litigation, 32 U.Chi. L.Rev. 1, 39 (1964). See also Swift & Co. v. Wickham, 382 U.S. 111, 122, n.18, 15 L.Ed.2d 194, 202 n.18, 86 S.Ct. 258 (1965) (Invocation of the Supremacy Clause by Plaintiff is irrelevant.)

[30] See also Newman v. Alabama, 503 F.2d 1320, 1326-27 (5th Cir. 1974): Whether "the relief sought, if granted, would inexorably condemn those promulgated rules and regulations not specifically challenged . . . ."

punishment in violation of their constitutional rights. Of course the statutes discussed above are presumably constitutional on their face, but not as applied. As applied, (said the trial court in effect) those statutes inflict cruel and unusual punishment upon Plaintiffs. The preliminary injunction, then, derived its justification only upon the ground that the state officers in this case should be enjoined from the further execution of major statutes because the statutes were unconstitutional in application.[31]

This Court has frequently stated that a three-judge court is required to enjoin a statute because unconstitutional as applied, even though the statute may be constitutional on its face. E.g., Steffel v. Thompson, 415 U.S. 452 n.7, 39 L.Ed.2d 505, 513 n.7, 94 S.Ct. 1209 (1974); Ex Parte Bransford, 310 U.S. 354, 361, 84 L.Ed. 1249, 1253, 60 S.Ct. 947 (1940); Department of Employment v. United States, 385 U.S. 355, 17 L.Ed.2d 414, 87 S.Ct. 464 (1966); Paul v. United States, 371 U.S. 245, 9 L.Ed.2d 292, 83 S.Ct. 426 (1963); United States v. Georgia Pub. Serv. Comm., 371 U.S. 285, 9 L.Ed.2d 317, 83 S.Ct. 397 (1963); Query v. United States, 316 U.S. 486, 86 L.Ed. 1616, 62 S.Ct. 1122 (1942). See also Boddie v. Connecticut, 286 F.Supp. 968, 971, rev'd on other grounds, 28 L.Ed.2d 113, mandate conformed 329 F.Supp. 844:

> Where an injunction is sought against enforcement of a state statute in a manner unquestionably expressive of the legislative intent, a three-judge

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[31] See Board of Managers of Ark. Tr. Sch. for Boys v. George, 377 F.2d 228, 231 (8th Cir. 1967):

> It would clearly be a "contradiction of reason" to attempt to enjoin the state from enforcement of a statute and at the same time not pass upon the constitutionality of the statute. Cf. United States ex rel. McNeill v. Tarumianz, 3 Cir., 242 F.2d 191. (E.S.)

> court is required, even if the statute might be perfectly constitutional in some of its intended application. (E.S.)

Petitioners in the case at bar constitute a class of "all those persons who are now or hereafter will be committed to the custody of the Defendant, Louie L. Wainwright."[32] Thus, the class of persons to whom the statutes are being applied is so broad that in practical effect the preliminary injunction leaves no room for any constitutional application of the statutes.

C.

Phillips v. United States, Ex Parte Bransford, and Butler v. Dexter have no application to the issue in the case at bar.

The Fifth Circuit's decision in this case is entirely consistent with this Court's decisions in Phillips v. United States, 312 U.S. 246, 85 L.Ed. 800, 61 S.Ct. 480 (1941), Ex Parte Bransford, 310 U.S. 354, 84 L.Ed. 1249, 60 S.Ct. 947 (1940), and Butler v. Dexter, 425 U.S. 62, 47 L.Ed.2d 774, 96 S.Ct. ____(1976). In each of those cases the administrative action to be enjoined was either ultra vires a statute, merely permitted but not required by a statute, or unauthorized by any statute and therefore plainly illegal. Unlike the case at bar, in none of those cases was the administrative officer enjoined from strict obedience to the unequivocal mandate of a statute.

There is a sharp and natural distinction between an injunction which restrains " . . . the action of any officer of such State in the enforcement or execution of such statute . . ." (28 U.S.C. §2281) and an injunction which restrains the action of an officer that is arguably authorized but not mandated by the statute, or lawless and ultra vires all

[32] Unpublished Order of the Trial Court, February 20, 1973.

statutory authority. Phillips v. United States, supra, is a classic example of the latter category. In Phillips, the United States sought to enjoin the Governor of Oklahoma from declaring martial law and blocking construction of a federal dam. The Governor justified his actions as authorized by the Oklahoma constitution and statutes. It is significant that those state laws did not require the Governor's actions; and indeed from Mr. Justice Frankfurter's frequent use of the word "lawless" it would appear that the Governor's declaration of martial law not only was not mandated by Oklahoma law but also may have been completely ultra vires all statutory authority. Mr. Justice Frankfurter implied as much as he explained why three judges were not required in Phillips:

> But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of §266. It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. 312 U.S. at 252, 85 L.Ed. at 805 (E.S.)

The Governor's action in Phillips was solely his own discretionary administrative action and not the "enforcement or execution" of a mandated legislative policy.[33]

[33] "In Phillips, on the other hand, it was the Governor, not the legislature, who had decided to block construction of the dam. If the legislature had directed him to call out the militia whenever someone attempted to build a dam in Oklahoma, the case would have been differently decided." (E.S.) Currie, The Three-Judge District Court in Constitutional Litigation, 32 U.Chi. L.Rev. 1, 44 (1964). Query v. United States, 316 U.S. 486, 86 L.Ed. 1616, 62 S.Ct. 1122 (1942) had the same explanation for the Phillips rule:

> And this is not, like Phillips v. United States, 312 U.S. 246, 85 L.Ed. 800, 61 S.Ct. 480, a case in which the state officials threatened to engage in conduct which state law could not reasonably be construed to authorize. 86 L.Ed. at 1620.

Phillips therefore has no application to the case at bar. Defendant Wainwright receives and maintains custody of prisoners on a daily basis, not as a single, unique exercise of authority, but because he is required to do so by the legislature in accordance with a clear statutory mandate. His actions are neither a misinterpretation of statutory authority or ultra vires the statute.

Petitioners cite Ex Parte Bransford as making the elusive distinction between suits challenging statutes because unconstitutional "as applied" (requiring a three-judge court) and suits complaining of an "unconstitutional result" obtained by use of a statute. If Bransford is read very carefully, however, one realizes that the "unconstitutional result" distinction is only restatement of the Phillips rule that three judges are not needed to challenge erroneous administrative action which is not required by the statute. Bransford therefore is not, on its facts, applicable to the case at bar.

Bransford was a four-pronged attack upon the collection of county taxes upon bank stock in Arizona. The first three challenges are not relevant here.[34]

The fourth challenge in Bransford was that the assessments were excessive and therefore "confiscatory" and "discriminatory." But unlike the case at bar, the assessment in Bransford that was to be enjoined was not mandated by a statute:

> Such [excessive] assessment, is made and if invalid, are so because of a

[34] The first challenge was that the assessments were void because "unauthorized by the statutes of Arizona." 84 L.Ed. at 1251. This was clearly a challenge within the teachings of Phillips that a suit to enjoin administrative action that is erroneous, or ultra vires the statute, can be heard by a single judge. The second and third challenges were based upon the Supremacy clause: that the assessments were in direct conflict with two federal statutes. A three-judge court is not required if the only constitutional question arises under the Supremacy Clause. 84 L.Ed. at 1252. Swift & Company v. Wickham, 382 U.S. 111, 15 L.Ed.2d 194, 86 S.Ct. 258 (1965).

> wrong done by officers under the statute rather than because of the requirement of the statute itself. (E.S., f.n. omitted.) 84 L.Ed. at 1252.

Thus, if one reads the entire passage in Bransford in which the distinction is made between "statutes unconstitutional as applied" and "unconstitutional results," one recognizes that the "unconstitutional results" distinction is actually a restatement of the Phillips rule that a three-judge court is not required to enjoin administrative action that is "lawless" or "erroneous administrative action":

> The contention of the Bank, however, is that the assessor misinterpreted the statute; that the objectionable aspect of the assessment is the attribution to the common of the whole amount instead of an apportionment to both preferred and common or the use of the preferred as capital stock in the state valuation formula. We are not now called upon to reach any conclusion upon the meaning of the Arizona tax statutes. If the trial court determines that the assessment complained of is made properly under the statute and that by the statute the assessment is to be prorated among the common shares, it would determine only a question of statutory construction. It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action . . . . (E.S., f.ns. omitted.) 84 L.Ed. at 1253.

Butler v. Dexter, decided last term, is entirely consistent with Phillips. In Butler, this Court relief upon the trial court's finding that the state defendants were not attempting to enforce a state criminal statute, but rather were improperly using the statute as a part of a pattern of police harrassment to stop the exhibition of a motion picture in

San Antonio. The trial court had ruled that "[b]y no stretch of the imagination could this statute be used to cover the plaintiff's actions or the possession of an ordinary portable 16 millimeter motion picture projector with removable interchangeable reels." 47 L.Ed.2d at 774. The court then cited Phillips for the point that the action of state officials sought to be enjoined was a lawless exercise of authority:

> Cf. Phillips v. United States, 312 US 246, 252, 85 L.Ed. 800, 61 S.Ct. 480 (1941): "But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority . . . . It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law." This situation is, of course, to be distinguished from an attack on a statute said to be unconstitutional "as applied." See also Ex Parte Bransford, 310 US 354, 84 L.Ed. 1249, 60 S.Ct. 947 (1940). (E.S., footnote 10.)

Butler v. Dexter is therefore inapplicable to the case at bar. The mandatory requirements of the statutes in this case clearly apply to Defendant Wainwright.

The Eighth Circuit cases cited by Petitioners are not contrary to the Fifth Circuit's decision in this case. Faubus v. United States, 254 F.2d 797 (8th Cir. 1958) is almost identical to Phillips, supra. The injunction in the Faubus case was not to enjoin the enforcement of any statute, but to enjoin the lawless, ultra vires, actions of Governor Faubus:

> The appellees' contention is, in effect, that he could not use State troops, ostensibly to preserve order, in violation of law. (E.S.) 254 F.2d at 805.

Similarly, Aaron v. Cooper, 261 F.2d 97 (8th Cir. 1958) is not like the case at bar. The injunction in that case involved only a single local school district. The defendants were

members of the local school board and the local superintendent. The injunction was purely local in character, and therefore did not require three judges. Board of Regents v. New Left Ed. Project, 404 U.S. 541, 30 L.Ed.2d 697, 92 S.Ct. 652 (1972); Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643, 87 S.Ct. 1544 (1967). Moreover, the actions enjoined in that case were purely voluntary actions, not mandated by statute:

> The only direct observation which we have made in relation to these statutes was to note that what appellees had done did not even represent acts purporting to be required of appellees by the statutes but constituted legally voluntary action on their part. (E.S.) 261 F.2d at 106.

School Board of City of Newport News, Va. v. Atkins, 246 F.2d 325 (4th Cir. 1957), cert. den., 355 U.S. 855 (1957) is equally inapplicable to the case at bar. Like Aaron v. Cooper, the injunction in that case operated only locally (forbidding racial discrimination in the public schools of Norfolk and Newport News, Virginia.) Moreover, the defendants in that case had only asserted that the statute - a Pupil Placement Act - provided an adequate state administrative remedy. The defendants were apparently not required to obey the statute, and no injunction was granted against the enforcement of the Act.

D.

> Petitioners' suggestion that 28 U.S.C. §2281, does not apply to conflicts "between the federal remedial power and state statutes" is directly contrary to the purpose of 28 U.S.C. §2281 and has never been so construed by any court.

Unable to find a decision of this Court inconsistent with the Fifth Circuit's en banc decision, Petitioners proffer a novel and unreasonable way to construe 28 U.S.C. §2281. Petitioners suggest that the injunction to release sentenced

prisoners is merely a "remdial order" of the trial court, and contend that " . . . the state law was overriden because of the district court's remedial power to enforce the Constitution." (P. 28, Petition for Writ of Certiorari.) Petitioners imply that the three-judge court statute should not be applicable because the statute was involved "only at the level of relief." (P. 22, Petition for Writ of Certiorari.)

Petitioners' suggestion has an obvious flaw: collision with the federal injunctive power and the state statute always comes in the relief stage. The remedy is what the three-judge court statute is all about. 28 U.S.C. §2281 is drafted in terms of the remedy to be granted. Were it not for the remedy - an injunction which "interposes the Constitution against enforcement of a state policy"[35] - three judges would not be required.[36] It matters not that the injunction against the operation of the statute is only temporary since 28 U.S.C. §2281 applies as well to preliminary injunctions.[37]

Petitioners' comparison of the "supremacy"[38] of the trial court's remedial power to this Court's treatment of

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[35] Phillips v. United States, 312 U.S. 245, 251, 85 L.Ed. 800, 805, 61 S.Ct. 480 (1941).

[36] See, e.g., Steffel v. Thompson, 415 U.S. 452, 457 n. 7., 39 L.Ed. 505, 513 n.7, 94 S.Ct. 1209 (1974); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 155, 9 L.Ed.2d 644, 653, 83 S.Ct. 554 (1963); Buchanan v. Evans, ___U.S.____, 46 L.Ed. 2d 293, 294 n.1, ____S.Ct.____ (1975) (Dissenting opinion); Flemming v. Nestor, 363 U.S. 603, 607, 4 L.Ed.2d 1435, 1442, 80 S.Ct. 1367 (1960).

[37] Withrow v. Larkin , 421 U.S. 35, 45 n.12, 43 L.Ed.2d 712, 722 n.12, 95 S.Ct. 1456 (1975).

[38] No one would dispute the supremacy of a proper exercise of the federal equity power to protect constitutional rights, but that power surely is not unlimited. See, e.g., Rizzo v. Goode, 423 U.S. 362, 46 L.Ed.2d 561, 96 S.Ct. ____ (1976); O'Shea v. Littleton, 414 U.S. 488, 38 L.Ed.2d 674, 94 S.Ct. 669 (1974). See also Edelman v. Jordan, 415 U.S. 651, 39 L.Ed.2d 662, 94 S.Ct. 1347 (1974).

Supremacy Clause cases in Swift & Co. v. Wickham, 382 U.S. 111, 15 L.Ed.2d 194, 86 S.Ct. 258 (1965), is inapt. The only thing similar is the word "supremacy."

In Swift this Court construed 28 U.S.C. §2281 to be not applicable to challenges to state statutes based solely upon the Supremacy Clause. The Court acknowledged that 28 U.S.C. §2281 could rationally have been construed either way, but decided that a more restrictive interpretation would be consistent with the statute's historic origins. Of importance to the case at bar, however, the Court in Swift commented that the three-judge court statute was largely aimed at ". . . injunctions against the enforcement of progressive state regulatory legislation, usually on substantive due process grounds."[39] In such cases there were " . . . the worrisome possibilities that economic or political predilections will find their way into a judgment."[40] The combined judgment of three judges was to be the safeguard.

The issues in the case at bar are infinitely more complex than Supremacy Clause cases, which involve only an analysis of statutory conflict between a state and a federal statute. To date no federal court has given a very precise answer to the issues raised in the case at bar: what is the minimum constitutional correlation between inmate housing, security staffing patterns, medical care, and cruel and unusual punishment? Is it a matter merely of square feet per inmate? At what point is there a system-wide "deliberate indifference to serious medical needs"? Estelle v. Gamble, 45 U.S.L.W. 4023, Nov. 30, 1976. These issues are difficult, involve major "economic and political predilections," and touch upon sensitive questions respecting state and federal

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[39] Swift & Co. v. Wickham, 382 U.S. 111, 127, 15 L.Ed. 2d 194, 205, 86 S.Ct. 258 (1965).

[40] Ibid.

relations. Such issues are indeed the historic subject matter of three-judge courts.

Petitioners cite five school desegregation decisions (P.29, Petition for Writ of Certiorari), and urge the Court to accept these as authority that "remedial orders" do not need three judges. But all of the cases cited involved local matters (injunctions against local officials) and for that reason alone did not require three judges.[41] Moody v. Flowers, 387 U.S. 97, 18 L.Ed.2d 643, 87 S.Ct. 1544 (1967).

The cases are distinguishable on other grounds, also. For example, in Bradley v. School Board of City of Richmond, Virginia, 324 F.Supp. 396 (E.D. Va. 1971) plaintiffs sought an order to consolidate the school system in the City of Richmond, Virginia, and two surrounding counties. The trial judge concluded that the defendants had full statutory authority to comply with the injunction requested, and therefore would not be required to violate any statute:

> The plaintiffs merely request that one or another authorized optional framework for school management be adopted. (E.S.) 324 F.Supp. at 400.

Bradley is therefore an orthodox application of the three-judge court statute.

The concept of "freezing" set forth in United States v. Duke, 332 F.2d 759 (5th Cir. 1964) is not a novel way to circumvent the three-judge court statute, but indeed is entirely consistent with the three-judge court opinions of this Court. First, the injunction in the Duke case was local, not statewide, so 28 U.S.C. §2281 obviously did not apply. But more important, the injunction did no more than order the

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[41] That is not to say that school desegregation cases, as a category of cases, always were heard by a single judge. The federal school desegregation cases consolidated in Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686 (1954) were all tried before three-judge courts.

voter registrar to either continue to apply the registration statutes loosely (but equally to black as well as white citizens) or to apply the statutes strictly and reregister all citizens. Had the registrar chosen to apply the statutes strictly he would have been in full compliance with those statutes, and no statute would have been nullified by the injunction. Conversely, had the registrar chosen to continue his loose interpretation of the statutes, it would not involve an injunction against the operation of the statutes to order him simply to continue that loose interpretation equally for blacks as well as whites.

Haney v. County Board of Education of Sevier County, 429 F.2d 364 (5th Cir. 1970) similarly was not a three-judge case. Again, the case involved only a single county school board. Moreover, it is not at all clear that the injunction in Haney required defendants to violate a statute, although perhaps compliance with the statute was, in and of itself, not enough to satisfy the constitutional claims. Haney says that "the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law," a statement which of course is true. But Haney then cites Louisiana v. United States, 380 U.S. 145, 154 (1965) as authority for that statement. Louisiana v. United States was a three-judge court case.

In Gautreaux v. Chicago Housing Authority, 342 F.Supp. 827 (N.D. Ill., 1972) a three-judge court was not needed because the effects of the order were only local, limited to the actions of the Chicago Housing Authority.

The injunction in United States v. Greenwood Municipal Sep. School Dist., 406 F.2d 1086 (5th Cir. 1969) required the local school board to insure an integrated school faculty. But since the school board had statutory authority to refuse

to approve teacher contracts, and could therefore comply with the order without violating a statute, a three-judge court was not necessary.

United States v. Board of Educ. of City of Bessemer, 396 F.2d 44 (5th Cir. 1968) is likewise distinguishable as a case not involving an injunction having statewide impact, and silent on the three-judge court issue. Moreover, the passing reference to teacher hiring or security statutes neither says that such statutes had to be violated nor discusses the need for a three-judge court. Of course, as the Bessemer court opines in dicta, 396 F.2d at 51, federal constitutional rights may not be overriden by state statutes, but that is not the same thing as saying that state statutes may procedurally be overriden by a single judge.

As their final reason for adopting an incorrect construction of 28 U.S.C. §2281, Petitioners note that requiring a three-judge court now will cause delay in litigation. Delay, of course, is not a desirable result, but Petitioners must share a large part of the responsibility for the delay. Petitioners chose to launch this massive attack upon Florida's correctional system, commingling many difficult issues. Petitioners also chose not to specify in detail the relief they were seeking. Petitioners would have suits of this nature be a pleaders' paradise, a matter of keeping Plaintiffs' options open indefinitely so that the trial court may "experiment with remedies." (P. 30, Petition for Writ of Certiorari.) As recently as last month, Petitioners sought to join as Defendants in the trial court Florida's Governor and Cabinet. The apparent reason for seeking joinder of those officials is that the Governor and Cabinet have some authority to reallocate appropriations and sell state lands. If delay

is caused because a three-judge court is needed to set aside state statutes governing appropriations and state lands, that delay is certainly not caused by Defendants.[42]

In summary, the decision herein by the en banc Fifth Circuit is in strict accord with the decisions of this Court. It would be quite inappropriate to confuse three-judge court law by adopting the strained and plainly wrong construction of 28 U.S.C. §2281 offered by Petitioners.

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42 The three-judge court statute was intended not only to expedite litigation but also to safeguard major state programs from improvident doom. Phillips v. United States, supra.

III.

THE COSTELLO CASE WAS COMMENCED LONG BEFORE THE PROSPECTIVE REPEAL OF THE THREE-JUDGE COURT STATUTE; THE REPEAL DOES NOT APPLY TO "ANY ACTION COMMENCED ON OR BEFORE THE DATE OF ENACTMENT."

Section 7 of Public Law 94-381, expressly provides that: "This Act shall not apply to any action commenced on or before the date of enactment." The word "commenced" is a technical word that has special meaning with respect to civil lawsuits in federal courts, and it must be assumed that Congress intended to use the word in its technical sense.[43] Rule 3 of the Federal Rules of Civil Procedure provides:

> A civil action is commenced by filing a complaint with the Court. (E.S.)

Congress intended to limit the repeal of 28 U.S.C. §2281 to cases which are commenced by filing a complaint after August 12, 1976. That "commenced" was to be understood as synonymous with "filing" is apparent from the section-by-section legislative analysis which provides:[44]

> Section 7.- This section provides that the act shall not apply to any action commenced on or before the date of enactment. It is merely added to make clear that cases filed prior to the enactment of this bill shall proceed to final disposition under the law existing on the date they were commenced. (E.S.)

The intent of Congress is clearly stated. Any other construction of the repealer would be an extraordinary distortion of plain words.

Bradley v. Richmond School Board, 416 U.S. 696, 40 L.Ed. 2d 476, 94 S.Ct. 2006 (1974) is authority contrary to Petitioners'

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43 Morissette v. United States, 342 U.S. 246, 263, 96 L.Ed.2d 288, 300, 72 S.Ct. 240 (1952). See generally 73 Am.Jur.2d §239, Statutes.

44 S. Rep. No. 94-204, U.S. Code Cong. & Admin. News, 94th Cong. 2nd Session, p. 3173.

position. Bradley states that an appellate court shall not apply a change in the law to a pending case if ". . . there is statutory direction or legislative history to the contrary." 416 U.S. at 711, 40 L.Ed.2d at 488. Bradley further said:

> Where Congress has expressly provided, or the legislative history has indicated, that legislation was to be given only prospective effect, the courts, in the absence of any attendant constitutional problem, generally have followed that lead. (E.S., citations omitted.) 416 U.S. at 715 n.21, 40 L.Ed.2d at 490 n.21.

The construction that Petitioners suggest not only flies in the face of Section 7 of the Act, but also would substitute a much more difficult rule to apply. When would a case be said to be "properly commenced" before a three-judge court? Should the critical point be official convening of the court by the appellate court? That would be unfair to those cases wherein the trial court had requested a three-judge court but none had yet been convened by the appellate court on August 12, 1976. Or should the critical point be the official request by the trial judge? Again, in a case where the trial judge inexplicably delayed making an official request (or, as in the case at bar, erroneously refused to request a three-judge court) it would be unfair to deny a three-judge court.

A three-judge court has been needed in this case at least since February 14, 1972, when Petitioners filed their First Amended Complaint demanding that Defendants "mandatorily . . . redistribute or reduce the prison population . . . ." Defendants must share the responsibility with Petitioners for failing to insure that a three-judge court was convened at that time. But 28 U.S.C. §2281 is jurisdictional and cannot be waived by the parties. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 9 L.Ed.2d 644, 83 S.Ct. 554 (1963). At least since May 12, 1975, Defendants have vigorously sought the

right to be heard by three-judges. Defendants should not be denied this jurisdictional right simply because the trial court erroneously denied the request for three judges.[45]

[45] The case was immediately appealed. The case was argued before the en banc Fifth Circuit on June 8, 1976, but the opinion was not rendered until September 27, 1976.

SUMMARY

For the foregoing reasons, the Petition for Writ of Certiorai should be denied.

Respectfully submitted,

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